



October 9, 2007

By Electronic Filing

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

Re: Ex Parte Notice: WC Docket No. 05-25, 04-440, 06-125, and 06-147

Dear Ms. Dortch:

Pursuant to Section 1.1206(b)(1) of the Commission's rules, the undersigned hereby gives notice that the written presentation attached to this letter was provided to Scott Bergmann, Scott Deutchman, Ian Dillner, John Hunter, and Chris Moore on October 5, 2007 by COMPTTEL, the Ad Hoc Telecommunications Users Committee, Time Warner Telecom, TelNet Worldwide, NuVox and XO Communications.

The attachment proposes that the Commission deny the petitions for broadband forbearance captioned above and adopt an interim solution to the problems identified by the Commission in the *Special Access Reform Rulemaking*,<sup>1</sup> also captioned above, that have resulted from the failure of competition to emerge in special access markets. Pending Commission action to reform its rules pursuant to that rulemaking, the interim relief proposed in the attachment would protect special access customers from anti-competitive practices and supra-competitive prices while preserving profit-maximizing incentives for service providers and the flexibility they need to respond to competition in the special access marketplace, should it emerge before the Commission takes final action in this docket.

*I. Incentive Regulation for Special Access Rates*

The interim proposal would ensure that the Commission's incentive regulation rules apply consistently to geographic areas served by (and all of the special access services provided by) incumbent local exchange carriers ("ILECs") who are subject to the Commission's incentive regulation (or "price caps") rules

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<sup>1</sup> *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) ("*Special Access Reform Rulemaking*").



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(“affected ILECs”). Incentive regulation currently applies to all areas served by affected ILECs except those areas subject to the Commission’s pricing flexibility rules<sup>2</sup> that have been classified as “Phase II areas.” The proposal would extend incentive regulation to those Phase II areas. This requirement would not disturb the regulatory *status quo* for AT&T since AT&T already made this change voluntarily as part of its merger with the former BellSouth.<sup>3</sup> For special access services that the affected ILECs have not yet included in their special access baskets under incentive regulation (including Ethernet), affected ILECs would make the same tariffed pricing adjustment that AT&T and BellSouth made to their Ethernet services as part of their merger commitments.<sup>4</sup>

By extending incentive regulation and the Phase I pricing flexibility rules to Phase II areas, the proposal allows the affected ILECs to respond to competition by negotiating customized contracts and offering volume and term discounts. To implement this change, the proposal allows customers to re-negotiate existing contracts but preserves customer access to prices in existing contracts.

Second, the proposal would make two temporary adjustments to the incentive regulation pricing formula for the special access basket pending comprehensive reform of the incentive regulation system in the special access docket. The first adjustment would return the formula to the structure in place before the Commission’s adoption of the “industry-proposed CALLS plan,” which established a temporary “five-year interim regime” for special access charges.<sup>5</sup> The CALLS plan substituted GDP-PI<sup>6</sup> as a rate adjustment factor for the productivity-based “X” factor in the incentive regulation formula. The proposal would revert to the use of a productivity or “X” factor of 5.3, which implements the formula that had been approved and in place at the time that the CALLS plan took effect. Upon expiration of the CALLS plan in July, 2005, those pre-existing rules with their 5.3 “X” factor were the appropriate default rate mechanism for the Commission to apply pending completion of the instant rulemaking.

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<sup>2</sup> See *Access Charge Reform*, CC Docket No. 96-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999), *aff’d*, *WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

<sup>3</sup> *AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662 (2007) at Appendix F, “Special Access,” para. 6.

<sup>4</sup> *Id.*

<sup>5</sup> *Special Access Reform Rulemaking*, note 1, *supra*, at para. 14 (“”).

<sup>6</sup> Gross Domestic Product-Price Index. See 47 C.F.R. § 61.3(r).



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The second formula adjustment in the proposal would address the Commission's failure to develop a replacement regulatory regime for the expired CALLS plan as well as the affected ILECs' failure to treat all price caps services consistently in their tariff filings during this period. The CALLS plan had eliminated productivity adjustments from incentive regulation based on the Commission's prediction that price-constraining competition would emerge to discipline prices during the five years that CALLS was in place and based on the Commission's intention to develop a replacement regime before expiration of the five-year term of the CALLS plan. Price-constraining competition has not developed as predicted and two years have elapsed since expiration of the CALLS plan with no replacement regime in place to discipline prices. Accordingly, the proposal includes an "exogenous adjustment," as provided for in the incentive regulation system,<sup>7</sup> to correct for the overpricing of special access that occurred during the two-year gap between the expiration of CALLS and application of the incentive regulation regime in place at the time CALLS expired. The exogenous adjustment would reflect the difference between the rates charged since CALLS expired and the special access rates that would have been charged for all special access services under incentive regulation had the affected ILECs applied incentive regulation to all special access services consistently as of the date that CALLS expired.

## *II. Exclusionary and Anti-Competitive Terms and Conditions*

The proposal would also eliminate a variety of non-cost-related conditions that the ILECs have imposed to limit the availability of the pricing discounts in their tariffs and contract tariffs. The proposal includes a list of representative terms and conditions which include such provisions as requirements that customers purchase unrelated products in order to obtain a discount on special access services, restrictions on the customer's purchase of unbundled network elements or other service alternatives, and exclusivity commitments that prevent customers from sending traffic to competitors even if the traffic remaining with the affected ILEC exceeds the minimum volumes required by the ILEC in the discount plan selected by the customer.

## *III. Market De-Stabilizing Limitations on Availability*

The proposal includes interim rules for all affected ILECs (including Verizon) that would require ILECs to make available to customers on identical

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<sup>7</sup>

See Section 61.45 of the Commission's rules, 47 C.F.R. § 61.45.



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terms and conditions the special access offerings the ILECs make available to their wireless or wireline affiliates.

*IV. One-Year Target for Completing Special Access Reform Rulemaking*

Finally, the proposal would set a one-year target date for completing the *Special Access Reform Rulemaking*. This time period would allow the Commission to obtain any additional data it believes is required to resolve the issues in this rulemaking and to develop a new framework for deregulation and forbearance of special access services when competition emerges in the marketplace for those services.

This letter and attachment are being submitted for inclusion in the record of the above-referenced proceedings in accordance with the Commission's rules.

Sincerely,

A handwritten signature in black ink that reads 'Colleen Bortley'.

Counsel  
Ad Hoc Telecommunications Users Committee

cc: Scott Bergmann  
Scott Deutchman  
Ian Dillner  
John Hunter  
Chris Moore

## **Proposal for Interim Special Access Relief**

The proposal applies to channel termination and channel mileage/transport or similar transmission services offered under interstate special access tariffs and contract tariffs, including but not limited to, DS1, DS3, Ethernet and OCn transmission services ("Products"). The relief proposed herein would be interim in nature, pending Commission release of an order adopting further reforms to its special access rules. This interim relief will result in rules applicable to all price cap ILECs, including Verizon. This proposal is premised on the denial of pending broadband forbearance petitions in WC Docket Nos. 04-440, 06-125 and 06-147, except that the non-RBOC petitions may be granted with respect to interexchange services.

### **Components**

- [1]** Interim rate adjustment based on applying the Commission's existing incentive regulation rules to achieve pricing that more nearly approximates competitive market prices
- [2]** Elimination of exclusionary and anti-competitive terms and conditions to address impact of market consolidation and to facilitate growth of and investment in competitive wholesale local access facilities
- [3]** Interim relief from anti-competitive discrimination against unaffiliated carriers to provide market stability pending further review and reform
- [4]** One-year target for completion of Commission action in this proceeding to issue any data requests it deems necessary and develop a new framework for deregulation and forbearance.

### **Details**

#### **[1] Rate adjustment**

- **Extend Phase I pricing flexibility rates to Phase II areas**
  - Apply "incentive regulation" to rates for all interstate special access services, including those special access services that the ILECs have not yet included in their price caps baskets, going forward
  - For the Products that have not yet been included in special access price caps baskets (such as Ethernet), in Phase II areas ILECs will adjust prices in their interstate access tariffs in the manner that AT&T-BellSouth adjusted Ethernet prices not subject to price caps in the AT&T-BellSouth merger commitments
  - Preserves contract discount plans
  - Fresh look allowing (but not requiring) customers to re-negotiate existing contracts for special access Products.
  - Throughout the time period during which this interim solution remains in effect, an ILEC may not charge a customer a rate for a Product that exceeds the rate the ILEC charged for that same Product to the customer at the time the proposal initially takes effect, regardless of whether a contract governing the sale of the Product at issue expires during the time period when this proposal is in effect.

- **Make two changes to the incentive regulation formula that will apply going forward to price caps rates, including Phase I rates**
  - First, use the FCC's 5.3 "X" factor (instead of GDPPI) which had been approved and in effect before the 5-year term of the CALLS plan. Upon expiration of the CALLS plan in July, 2005, incentive regulation with a 5.3 "X" factor was the default rate mechanism pending FCC adoption of final rules in the special access rulemaking
  - Second, make a one-time downward "exogenous adjustment" (in accordance with the incentive regulation rules) to the formula applicable to Phase I rates. The exogenous adjustment would be as follows:
    - Size the exogenous adjustment to address the FCC's failure to (1) develop a regulatory regime to apply after the July, 2005 expiration of the CALLS term and (2) require consistent treatment of all special access services as price caps services in Phase I areas
    - CALLS Order eliminated productivity adjustments from incentive regulation based on (1) the FCC's prediction that price-constraining competition would emerge in the out years of the 5-year CALLS plan and (2) the FCC's intention to develop a replacement regime before expiration of the 5-year term of the CALLS plan
    - Price-constraining competition has not developed as predicted
    - Two years have elapsed since the expiration of CALLS in July, 2005
    - This exogenous adjustment would capture the special access overpricing (in both Phase I and Phase II areas) that occurred during the two-year gap between expiration of CALLS and compliance with the applicable incentive regulation regime
    - To do so, the adjustment would be based on a calculation of the difference between the rates charged since CALLS expired and the rates that would have been charged if (1) the formula had reflected a return to the 5.3 "X" factor upon expiration of CALLS and (2) all special access services had been treated consistently and subjected to price caps as of the date of the expiration of CALLS

**[2] Elimination of exclusionary and anti-competitive terms and conditions**

Conditions on the availability of discounts that are not directly related to cost savings in the provision of special access services are deemed unjust and unreasonable, and therefore unenforceable, including but not limited to the following:

- (a) any requirement to purchase different products to secure a discounted price;

- (b) any requirement to purchase products in different geographic markets to secure discounted price;
- (c) any requirement for a certain percentage of the customer's spend or restriction on the use of section 251 unbundled network elements ("UNEs") or other alternative service offerings from the ILEC or competitors;
- (d) any requirement to move circuits from competitors;
- (e) any growth or exclusivity requirements;
- (f) punitive termination penalties;
- (g) any discount plan for which only RBOCs and or their affiliates can qualify;
- (h) any restriction on circuit portability; and
- (i) any restriction on network grooming

**[3] Interim relief to provide market stability pending further review and reform**

This interim relief proposal is to be adopted in the form of interim rules applicable to all price cap LECs, including Verizon.

These interim rules shall remain effective until replaced by new rules. Price cap LECs shall have 45 days to file conforming tariffs.

Interim rules shall require ILECs to make available to customers on identical terms and conditions all special access offerings made available to any wireless or wireline affiliate of any ILEC.

**[4] One-year target for completion of Commission action in this proceeding**

The Commission shall set a one-year target date for completion of this proceeding. During that time frame the Commission can issue any data requests it deems necessary, consider rate structure simplification, and develop a new framework for deregulation and forbearance.